IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NOS. 33, 34, 35, 36, 38, 39, 40, 41, 42 and 43 of 2006.

Tax Appeal No. 33/2006.

M/s Scoop Industries Pvt. Ltd.,
Caranzalem, Goa. .... Appellant.

Versus

The Income Tax Officer,
Panaji, Goa. .... Respondent.

Tax Appeal No. 34/2006.

M/s Himform,
A partnership firm registered under
The Indian Partnership Act,
Plot No.320, Kundaim Industrial Estate,
Kundaim, Goa. .... Appellant.

Versus

The Asst. Commissioner of Income Tax,
Ward 1(2), Aaykar Bhavan, Patto,
Panaji, Goa. .... Respondent.

Tax Appeal No. 35/2006.

M/s. Kundil Rolling Mills Pvt. Ltd.
A-2, Kundaik Industrial Estate,
Kundaim, Goa. .... Appellant.

Versus

The Asst. Commissioner of Income Tax,
Circle – 2(1), Aaykar Bhavan, Patto,
Panaji, Goa. .... Respondent.

Tax Appeal No. 36/2006.

M/s. Kundil Alloys Pvt. Ltd.
A-1, Kundaim Industrial Estate,
Kundaim, Goa. .... Appellant.

Versus

The Asst. Commissioner of Income Tax,
Circle – 2(1), Aaykar Bhavan, Patto,
Panaji, Goa. .... Respondent.

Tax Appeal No. 38/2006.

Professional Oral Care Products Pvt. Ltd.,
Plot No.158, Kundaim Industrial Estate,
Kundaim, Goa. .... Appellant.

Versus

The Asst. Commissioner of Income Tax,
Circle – 2(1), Aaykar Bhavan, Patto,
Panaji, Goa.

Tax Appeal No. 39/2006.

Professional Oral Care Products Pvt. Ltd.,
Plot No.158, Kundaim Industrial Estate,
Kundaim, Goa. .... Appellant.

Versus

The Asst. Commissioner of Income Tax,
Circle – 2(1), Aaykar Bhavan, Patto,
Panaji, Goa.

Tax Appeal No. 40/2006.

M/s. Shail Foods & Packaging Pvt. Ltd.
L-111, Phase II-E, Verna Industrial Estate,
Verna, Salcete, Goa. .... Appellant.

Versus

Joint Commissioner of Income – tax
Margao Range,
Margao – Goa. .... Respondent.

Tax Appeal No. 41/2006.

M/s. Orchid Biomedical System
Alto Santacruz, bambolim,
Goa. .... Appellant.

Versus

The Asst. Commissioner of Income Tax
Circle 1, Patto,
Panaji, Goa.. .... Respondent.

Tax Appeal No. 42/2006.

M/s. Shail Foods & Packaging Pvt. Ltd.
L-111, Phase II-E, Verna Industrial Estate,
Verna, Salcete, Goa. .... Appellant.

Versus

The Income-Tax Oficer,
Ward – 4,
Margao- Goa. .... Respondent.

Tax Appeal No. 43/2006.

M/s. Himform,
A partnership firm registered under
The Indian Partnership Act,
Plot No. 320, Kundaim Industrial
Estate, Kundaim, Goa.

Versus

The Asst. Commissioner of
Income Tax, Circle 2(1),
Aaykar Bhavan, Patto,

Panaji, Goa. .... Respondlent.

Mr. S. N. Inamdar with Mr. S.G. Bhobe, Advocates for the Appellants.

Mr. S. R. Rivonkar, Advocate for the Respondents.

CORAM: Dr. S. RADHAKRISHNAN, &
N. A. BRITTO, JJ.

DATE: 10th OCOTOBER, 2006.

ORAL JUDGMENT: (PER DR. S. RADHAKRISHNAN, J.)

In all the above Tax Appeals the following two substantial questions of law have been raised which read as under :-

i) Whether the Income Tax Appellate Tribunal was justified in law in confirming the order of the Assessing Officer thrusting the depreciation which was not claimed in the return of income and reject the claim of deduction under section 80IA ?

ii) Whether on the facts and in law, the Appellate Tribunal is right in holding that the deduction under Chapter VIA has to be allowed only after allowing the depreciation under section 32 of the Act which has not been claimed in the return of income ?

2. As the identical substantial questions of law are involved in all the above Tax Appeals, by this Judgment and Order, we are disposing of all the

above ten Tax Appeals by this common judgment and order.

3. To understand the controversy, we are giving the brief factual background in the first appeal and even in the other Tax Appeals facts are identical excepting the amounts involved and the dates. As such we are not burdening the judgment with all those details regarding figures and dates.

4. As far as the first Tax Appeal No. 33 is concerned, the brief facts are:-

> (a) The Appellant is a Private Limited Company engaged in the business of manufacturing industrial gases. The Appellant's industrial undertaking in an eligible unit under the provisions of section 80IA of the Act. Thus, the Appellant claimed deduction under section 80IA to the extent of it's profits amounting to Rs.12,72,571/-. The returns for the impugned Assessment Year was filed on 09/11/2000 and the income was shown at Nil. The Appellant in it's return of income by way of a note mentioned that it is not claiming the depreciation allowable under section 32 relying on the decision of the Apex Court in the case of **CIT VS. Mahindra Mills {2000] 243 ITR 56 (SC).** The returns were subject matter of scrutiny assessment. While passing the Assessment Order under section 143(3) of the Act the Assessing Officer rejected the appellant's claim on the ground that the word 'shall' used in section 32 of the Act makes it obligatory on the part of the Assessing Officer to allow deduction for depreciation after deletion of sub section 1 of section 34. The Respondent was of the opinion that the

legislative intent in deleting section 34(1) has to be understood as withdrawal of the discretion available to the assessee to claim deduction of depreciation under section 32 of the Act. The Respondent rejected the claim of deduction under section 80IA and computed the total income by thrusting the depreciation which was not claimed in the return of income.

(b) – The Appellant being aggrieved by the assessment Order passed by the Respondent preferred an appeal before the Commissioner of Income-tax (Appeals). (Hereinafter referred to as the CIT(A)). The CIT(A) referred to the decision of the Apex Court in the case of CIT Vs. Mahindra Mills (SC) and referred to the Hon'ble Punjab & Haryana High Court Decision in the case of Ramnath Jindal 252 ITR 590 and held that the insertion of explanation 5 by Finance Act, 2001, to Section 32 which comes into effect from A.Y. 2002-03 makes it clear that the assessee had an option not to claim depreciation as deduction for the earlier Assessment Years. The CIT(A) allowed the Appellant's appeal.

© The Respondent being aggrieved by the order of the CIT(A) preferred an appeal u/s 253 before the Appellate Tribunal. The Appellate Tribunal referred to the various decisions and then followed the decision of the Appellate Tribunal's Special Bench in the case of Vahid Paper Converters Vs. ITO [2006] 98 ITD 165 (Ahd)(SB) and held that while computing the deduction under Chapter VIA the appellant has to compute the profits by deducting the depreciation allowable u/s 32. Thus, the contention of the Respondent was upheld and the claim of the Appellant made in the Return was rejected.

5. Mr. Inamdar, the learned counsel appearing on behalf of the appellants in all the above ten appeals, made the following propositions to substantiate his contentions :-

i) In computing Gross Total Income under normal provisions of the Act, an assessee is entitled not to claim depreciation and if he does not claim, depreciation cannot be thrust upon him. (177 ITR 443 & 243 ITR 56) based on the word " allowed " used in S.32(1).

ii) For applying the provisions of chapter VI-A, Gross Total income as computed above is the starting point (S.80A(1) & S.80I(A).

iii) It is only those profits which are included in such Gross Total Income which can be considered for relief under any provision of Chapter VI-A, (S.80IA(1)) p. 447 of 177 ITR.

iv) Therefore, if assessee has not claimed depreciation at all depreciation cannot be deducted only for computing profits under a particular section of chapter VI-A.

v) But if the assessee has claimed depreciation in computing Gross Total Income but does not claim depreciation only for computing deduction under any provision of Chapter VI-A, it is not permissible (261 ITR 98)

vi) The choice of not claiming depreciation is upheld because

there are/were competiting tax relief's which are time bound, while depreciation is not.

vii) Cambay Electric's decision did not deal with this aspect at all.

6. Mr. Inamdar strongly submitted that in the light of the Judgments of the Supreme Court in ***Commissioner of Income-Tax v. Mahendra Mills 243 ITR 56*** and also of the Bombay High Court in ***Commissioner of Income-Tax v. Shri Someshwar Sahakari Sakhar Karkhana Ltd. 177 ITR 445*** the assessee has an option whether to avail of the depreciation or not under Section 32 of the Income Tax Act (hereinafter referred to as the said Act). To put it in other words, Mr. Inamdar submitted that the claim of such depreciation cannot be forced down the throat of the assessee. Mr. Inamdar contended that for the purpose of tax planning if it is more advantageous to the assessee, the assessee has a choice in a particular year to claim that depreciation or may opt not to claim the depreciation. He made a fervent plea that even if the assessee is a "newly established undertaking" wherein Chapter VI-A of the said Act would apply, even then the assessee has an option whether to opt for depreciation or not. He strongly contended that both the aforesaid judgments i.e. ***Commissioner of Income-Tax v. Mahendra Mills*** as well as ***Shri Someshwar Sahakari Sakhar Karkhana Ltd.***make it explicitly clear that it is not mandatory for the assessee to claim depreciation and the same has been made optional. If that be so, Mr. Inamdar contended that the Income Tax Tribunal had wrongly construed the provisions of law to make it

compulsory for these assessees to claim depreciation allowance under Section 32 of the said Act and thereafter claim their deductions under Chapter VI-A of the said Act.

7. Mr. Inamdar thereafter sought to distinguish the Division Bench judgment of our High Court in ***Indian Rayon Corporation Ltd. v. Commissioner of Income-Tax 261 ITR 98*** contending therein that in that case the only issue involved was determination of the amount of depreciation which should be set off while computing the profits and gains derived by the assessee from the "newly established undertaking" covered by Section 80HH. Therefore, Mr. Inamdar submitted that the observations of the Division Bench judgment in the above case, regarding interpretation of Section 32 of the said Act as well as Chapter VI-A of the said Act, ought not to be taken into account as the Court was only concerned with the aforesaid computation of depreciation.

8. Thereafter Mr. Inamdar referred to another judgment of the Bombay High Court in ***CIT v. Gannon Dunkerley & Co. Ltd. (Bom) (1995) 216 ITR 708*** and the Judgment of the Supreme Court in ***Cambay Electric Supply Industrial Co. Ltd. v. CIT (SC) (1978) 113 ITR 84,*** and contended that they have no application in the instant case.

9. Mr. Inamdar also pointed out that the recent judgment of the Special

Bench of the Income Tax Appellate Tribunal in ***Vahid Paper Converters & Ors. v. Income Tax Officer (SB) (2006) 98 ITR 165*** had not construed the judgments of the Supreme Court in ***CIT v. Mahendra Mills*** as well as Bombay High Court judgment in ***CIT v. Someshwar Sahakari Sakhar Karkhana Ltd.*** in the proper perspective, accordingly he contended the said judgment is not correct as per law.

10. Mr. Rivonkar, the learned counsel appearing on behalf of the respondent/Revenue strongly relied on a Division Bench judgment of our High Court in ***Indian Rayon Corporation Ltd. V. Commissioner of Income Tax (Bom.) (2003) 261 ITR 98*** and pointed out that the said judgment very specifically deals with the interpretation of Section 32 of the said Act read with Chapter VI-A of the said Act and the Division Bench has observed as under at page 106:-

> " In the above judgments of the Bombay High Court to which one of us (Kapadia J.) was a party it has been held, inter alia, that Chapter VI-A of the Income-tax Act deals with special deductions. That, Chapter VI-A, for the purposes of computing such deductions, constituted a separate code by itself. In order to compute the total taxable income of the assessee, deductions computed under section 80HH have to be reduced from the gross total income of the assessee. The question basically in this matter is concerning computation of deduction under Chapter VI-A in which section 80HH falls. **Profits**

> **and gains of a newly established undertaking, therefore, have got to be computed as per the provisions of section 29 to section 43A and if the assessee claims relief under Chapter VI-A of the Act, then it is not open to the assessee to disclaim depreciation allowance.** This is because Chapter VI-A is an independent code by itself for computing these special types of deductions. In other words, one must first calculate the gross total income from which one must deduct a percentage of incomes contemplated by Chapter VI-A. That such special incomes were required to be computed as per the provisions of the Act, viz., section 29 to section 43A, which included section 32(2). **Therefore, one cannot exclude depreciation allowance while computing profits derived from a newly established undertaking for computing deductions under Chapter VI-A. Therefore, the appellant's claim for allowance of deduction under section 80HH, without taking into consideration the current depreciation will have to be rejected.**
>
> Conclusion :
>
> For the above reasons, we answer the above question in the affirmative, i.e., in favour of the Department and against the assessee." (Emphasis supplied by us)

11. Mr. Rivonkar contended that the Division Bench has considered very specifically the very questions raised in the present Tax Appeals in the sense, it has clearly interpreted to hold that it is not open to the assessee to disclaim depreciation allowance and as far as the "newly established undertaking" is concerned, the profits and gains have got to be computed as

per the provisions of Sections 29 to Section 43A of the said Act even if the assessee claims relief under Chapter VI-A of the said Act and. it is not open to the assessee to disclaim depreciation allowance. Finally the Division Bench has in no uncertain terms held that no one can "exclude depreciation allowance" when computing depreciation allowance for computing deductions under Chapter VI-A. Mr. Rivonkar pointed out that as far as ***Cambay Electric Supply Industrial Co. Ltd.*** is concerned they were dealing with the issue of whether unabsorbed depreciation and development rebate are deductible or not in computing the profits under Section 80E of the said Act. In that context, the Supreme Court had observed and given a ruling. Similarly even in the case of ***CIT v. Gannon Dunkerley & Co. Ltd. (Bom.) (1995) 216 ITR 708*** the Bombay High Court was dealing with the issue whether to exclude unabsorbed depreciation and unabsorbed rebate while computing the total income, wherein the Division Bench has clearly held at page 710, as under :-

> " Therefore while ascertaining the profits and gains attributable to a priority industry which forms a part of such total income necessary deductions required under the Income Tax Act have to be made including deduction for depreciation. In the present case, it is only the depreciation in the

> current year which is being deducted and we do not see any provisions in Section 80-I under which such depreciation requires to be added back to the profits and gains attributable to the priority industry for the purpose of calculating the eight per cent deduction under that section. ”

The Division Bench decided the matter in favour of the Revenue.

12. Mr. Rivonkar thereafter referred to a judgment of the Rajasthan High Court in ***Vijay Industries v. Commissioner of Income Tax 370 ITR*** 175 dealing with the very same issue of whether a “newly established undertaking” while claiming special deduction under Section 80HH and where depreciation ought to be claimed under Section 32 or not, has held that the depreciation under Section 32 will have to be first taken into account, before granting deduction under Chapter VI-A.

13. Similarly the learned counsel Mr. Rivonkar for the Revenue referred to a judgment of the Gujarat High Court in ***Commissioner of Income Tax v. Cadilla Chemicals Pvt. Ltd. 259 ITR 692*** wherein in no uncertain terms held that when any deduction under Section Chapter VI-A is claimed, then while computing the total income the depreciation will have to be deducted before

making any deduction under Section 80HH of the said Act. In the light of the above and also in view of detailed judgment of the Income Tax Tribunal (Special Bench) in ***Vahid Paper Converters & Ors. v. Income Tax Officer (SB) (2006) 98 ITR 165*** Mr. Rivonkar submitted that the interpretation of law as propounded by the ITAT is the proper one and the above appeals ought to be dismissed and the question ought to be answered in the affirmative, in favour of the Revenue.

14. After having considered the arguments of both the learned counsel for the assessees as well as the Revenue, we are clearly of the view that the Division Bench Judgment of the Bombay High Court in ***Indian Rayon Corporation Ltd. v. Commissioner of Income Tax (Bom). (2003) 261 ITR 98*** in no uncertain terms holds that if a "newly established undertaking" claims a deduction under Chapter VI-A of the said Act, then total income ought to be computed as per Sections 29 to 43A of the said Act which includes section 32 i.e. before granting any deduction under Chapter VI-A, the depreciation under Section 32 of the Act will have to be granted and thereafter the deduction under Chapter VI-A can be granted. To put it in other words the assessee if claiming deduction under Section Chapter VI-A as a "newly established undertaking", will have to claim depreciation first and thereafter only the total income can be computed so as to enable the said undertaking to claim the benefit as a "newly established undertaking" under Chapter VI-A.

15. It may be also noted that both ***C.I.T. v. Mahendra Mills 243 ITR 56 and CIT v. Someshwar Sahakari Sakhar Karkhana Ltd. 177 ITR 445,*** were basically dealing with only in the context of depreciation under Section 32, and not in the context of benefits under Chapter VIA of the said Act.

16. The logic behind the deductibility of depreciation while computing the eligible profits for Chapter VI-A, is because if the depreciation is not reduced while computing the income, the assessee would claim deduction on gross amount of income and that would amount to making more deduction under Chapter VI-A, that what the assessee is entitled to.

17. It may be also noted that by not claiming depreciation, the assessee is in fact claiming higher deduction under Chapter VI-A, and at the same time keeping Written Down Value of its assets high (because if depreciation is claimed, Written Down Value would be reduced by the amount of depreciation actually allowed). The assessee would claim depreication on such high Written Down Value in the subsequent year. Thus, by not claiming depreciation in the years in which assessee is entitled to deduction under Chapter VI-A, assessee claims a double advantage (i) claiming a higher deduction under Chapter VI-A, than its entitlement, (ii) keeping the Written Down Value of assets high resulting in higher claim of depreciation in the subsequent years.

18. Under the aforesaid facts and circumstances, we answer both the aforesaid substantial questions of law in the affirmative in favour of the Revenue and against the Assessee, Income Tax Appeals stand disposed of accordingly.

Dr. S. RADHAKRISHNAN, J.

N. A. BRITTO, J.

sl.